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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-919

OLYMPIC INSURANCE COMPANY

versus

H. D. HARRISON, INC., D/B/A
HARRISON'S INSURANCE SERVICE

PETITION FOR WRIT OF CERTIORARI
TO REVIEW THE DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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INTRODUCTION

Petitioner H. D. Harrison, Inc., D/B/A Harrison's Insurance Service (hereinafter "Harrison"), seeks review on writ of certiorari of a judgment by the Fifth Circuit Court of Appeals reversing the trial court's denial of Olympic Insurance Company's (hereinafter "Olympic") motion for judgment n.o.v. after a jury verdict was returned in favor of petitioner. The opinion of the court of appeals in this case represents the most radical departure from the traditional allocation of functions between courts and juries yet taken

by any United States court of appeals. The first four pages of the appellate court's five-page opinion are devoted to a complete reexamination and reevaluation of the credibility of the evidence presented to the jury, during the course of which the court substitutes its own interpretation of the facts for that of the jury. The court cites only one case to justify its action, and that case directly contradicts previous holdings of this Honorable Court.

The Circuits have been divided for some time on two questions involving judgments notwithstanding the verdict: one is whether the court is to look only to the evidence favorable to the party against whom the motion is made, or whether it is to consider all the evidence in ruling on the motion; the other is what the test of the sufficiency of the evidence is for judgments n.o.v. Both of these questions are squarely presented by the instant case, and petitioner urges this Court to take the opportunity offered by this extreme example of arrogation of the functions of the jury to put an end to the discord which has marked the decisions of the appellate courts with respect to judgments n.o.v. It is petitioner's firm conviction that the confusion which currently reigns over this area of the law has been instrumental in spawning numerous appeals which would otherwise not have been taken, and that clarification of the issues involved in this case could significantly reduce the volume of litigation which goes beyond the trial court stage. In this spirit, petitioner respectfully requests that this Honorable Court grant review on writ of certiorari in the instant case.

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JURISDICTION

Federal jurisdiction over this matter rests upon diversity of citizenship. The controversy was tried to a jury on March 22 through March 26, 1971 and, pursuant to the jury's verdict on written interrogatories, the trial court entered judgment in favor of petitioner on April 7, 1971. Olympic timely moved for judgment n.o.v., alternatively for a new trial, and in the further alternative for a remittitur. Argument on the post-trial motions was heard on May 26, 1971, and on June 3, 1971 the court entered an order denying Olympic's motions. Olympic appealed to the Fifth Circuit Court of Appeals which, in an opinion reported at 463 F.2d 1049 (1972), reversed the trial court's denial of judgment n.o.v. and remanded the case with instructions to enter judgment in favor of Olympic. A petition for rehearing filed on behalf of petitioner was denied on September 25, 1972.

This Court's jurisdiction is invoked pursuant to Title 28, Section 1254(1) of the United States Code on several grounds. First, the appellate court's holding that "on motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the nonmover's case" (463 F.2d at 1054) is in direct conflict with the decisions of other courts of appeals and with applicable decisions of this Court. Second, the test used by the appellate court in determining whether or not judgment n.o.v. should have been granted differs from the test applied by other courts of appeals and from the test delineated by applicable decisions of this Court. Third, the appellate court's failure to apply the correct test to the evidence in determining whether or not judgment

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n.o.v. should have been granted in the instant case violated petitioner's right to a jury trial guaranteed by the Seventh Amendment to the Constitution.

QUESTIONS PRESENTED FOR REVIEW

1. A motion for judgment n.o.v. should be granted or denied on the basis of evidence favorable to the party against whom the motion is made, and the appellate court erred in failing to restrict itself to such evidence in ruling on Olympic's motion for judgment n.o.v.

2. A motion for judgment n.o.v. should be granted only when there is a complete absence of probative facts to support the conclusion reached by the jury, and the appellate court's holding to the contrary is in error.

3. The appellate court's stated reasons for reversing the trial court's denial of Olympic's motion for judgment n.o.v. so far invade the traditional province of the jury as to result in a denial of petitioner's right to a jury trial guaranteed by the Seventh Amendment to the Constitution, which provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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STATEMENT OF THE CASE

On May 1, 1965, Olympic and Harrison entered into a contract under which Harrison became Olympic's general agent for the sale of mobile home insurance policies in the states of Alabama, Arkansas, Colorado, Florida, Illinois, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina and Tennessee. The agreement provided that Harrison was to solicit and service insurance business for Olympic in return for a percentage of the premiums.

From the outset, Harrison encountered unexplained difficulties and inequities in its dealings with Olympic. Olympic was relatively new in the mobile home insurance business, and there was a lack of clear-cut policy with respect to loss adjustments and claims settlements. It appears that at times Olympic's own insurance adjusters were not aware of the coverage afforded by Olympic's policies. The result was that Olympic denied coverage on claims that should have been honored, and this practice seriously jeopardized Harrison's reputation as well as the reputations of its subagents. Harrison's president explained the problem this way:

> Q Were there any specific difficulties with regard to loss adjustments, claim settlements?
>
> A Oh, yes. The biggest thing was possibly, if I can recall, was not understanding, not understanding the coverages on the policies. Quite often the adjusters simply didn't read the policies and didn't read the appropriate coverage, didn't know what the coverage was.

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Q Do you mean the insurance company's representative, the adjuster, didn't understand the subject matter of the insurance?

A Correct.

Q Well, how did this cause you difficulty?

A Well, immediately the customer would go to the dealer and say listen, I bought this mobile home from you and you sold me that policy of insurance. Now, I say I have coverage and they say I do not. What is the situation? Well, the subagents would immediately pick up the phone and call the office and say listen, you told me that he had coverage and now they tell me that he doesn't have coverage. What goes on here? If that happens a few times, he is going to go to another insurance company for his insurance business. This is vitally important to an insurance company, the agent and everybody, I would say. (App. 250)

Harrison's reputation was also being damaged by arbitrary discrimination on the part of Olympic. Harrison was supposed to be able to provide its subagents and customers with a full line of insurance, but Olympic refused to permit Harrison to write policies on rented mobile homes in fixed locations, even though it permitted another general agent in Tennessee to write such insurance. Olympic even discriminated against Harrison with respect to rates for insurance. At a time when Olympic required Harrison to write insurance in the state of Oklahoma at the rate of $1.80,

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it permitted another general agent in the same state to write insurance at a rate of $1.05.

Harrison made numerous attempts through correspondence to apprise Olympic of the adverse effects these inconsistencies were having upon the agency, but to no avail. Finally, after more than two years of fruitless attempts at establishing lines of communication, Harrison hit upon a means of making Olympic take notice of its problems. One of the agency's functions was to collect the monthly premiums on the insurance written by it and remit them to the home office. In January of 1968, Harrison's president notified Olympic that the agency would not remit the premiums due that month "until such time as someone in authority came to our office and sat down with us and endeavored to iron out these problems" (App. 254). Olympic immediately sent a company representative to Harrison's offices for what Harrison then assumed to be a good faith attempt to arrive at an understanding which would ease the strained relations between the company and the agency. During the course of that meeting, the company made a number of commitments to Harrison through its representative, an Olympic vice-president named L. R. Sellars, which were later confirmed in a letter from Sellars to Harrison's president dated January 18, 1968.

Over the next six months, Olympic not only failed to live up to the commitments it had undertaken at its meeting with Harrison in January of 1968, but it permitted the relationship to deteriorate still further. The company arbitrarily reduced Harrison's commissions on the premiums, without explanation. It forced Harrison to cancel policies on rented mobile homes, even though other

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agencies were being permitted to write such insurance and Olympic's own underwriting guide specifically authorized the writing of such insurance. In June of 1968, Harrison concluded that it would have to resort once again to the only method it knew of making Olympic take notice of its mounting dissatisfaction -- withholding premiums. This time, however, Olympic responded by filing suit against Harrison in federal court on the basis of diversity of citizenship on July 25, 1968, so that it would have more leverage against the agency when they met at the bargaining table.

A meeting between the president of Olympic and the president of Harrison was held on August 2, 1968 in New Orleans. It was there that Harrison learned, for the first time, the true reason for Olympic's uncooperativeness. Harrison's president recalled the revelation this way:

> Q In what manner were you told that there was no room for discussion or negotiation with regard to this long-term continuation of business?
>
> A As well as I recall, it just -- they just looked at me and said Mr. Harrison, we are just not interested in discussing this because we are not interested in proceeding in the insurance business and this is just not open for discussion. This was very abrupt and very much to the point, not in a hostile way, but very abrupt and to the point. (App. 268)

It was disclosed that Olympic was part of a large insurance group called the Country-

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Wide Insurance Group and that the ContryWide Insurance Group was in turn controlled by the Trans-American Insurance Corporation. Trans-American had decided to withdraw from the mobile home insurance business, so its interest in the future of the Harrison Agency was limited to making sure that Olympic received the premiums on insurance which had already been written. When Harrison's president learned this startling news, his key concern immediately became the negotiation of some short-term arrangement with Olympic which would give the agency an opportunity to make a transition to another insurance company. Harrison's president knew that it would be impossible to contract with another insurance company so long as the agency was in litigation with the insurance company it currently represented, so he demanded that Olympic dismiss its law suit against Harrison in return for the prompt payment of premiums by Harrison. He also insisted upon a letter from Olympic to the effect that all problems between Harrison and Olympic had been amicably resolved and authority to use this letter in future discussions with other insurance companies Harrison might seek to represent. Harrison's president was also very adamant about the fact that he was not going to give any personal guarantees on the agency's obligations now that it was clear that Olympic had not the slightest interest in the agency's future:

> It was specifically stated by me and I agreed that I would not, I repeat, would not ever again and I was very vehement about this at the meeting, never again would I give Olympic Insurance Company any personal endorsement on the contract." (App. 269-270).

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The meeting of August 2, 1968 between the president of Harrison and the president of Olympic resulted in an agreement containing four major points:

(1) The general agency contract between Harrison and Olympic would remain in effect through December 31, 1968;

(2) Harrison would keep the premium account current during the remaining term of the contract;

(3) The volume of business that Harrison could write for each month within the remaining term of the contract would be equal to the average monthly volume of business written during the first seven months of 1968; and

(4) Olympic would dismiss the lawsuit filed against Harrison.

To seal the agreement, Harrison paid Olympic $158,476.27, representing the full amount of the past due premiums, on that very day. At the same time, Mr. W. J. Smith, the president of Olympic, wrote and delivered to Harrison the letter attesting to an amicable settlement of their differences which had been requested by Harrison's president. After returning to his office in Los Angeles, Smith rewrote the same letter to Harrison on official company stationery. The letter reads:

"New Orleans, Louisiana
August 2nd, 1968

H. D. Harrison, Inc.
4226 Chef Menteur Highway
New Orleans, Louisiana

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Attention: H. D. Harrison, Pres.

Gentlemen:

We are very pleased that the litigation and differences between us have been amicably resolved and that we have been able to continue our business relationship.

No dispute of this consequence is ever unilateral and we believe it is a compliment to both of us that our differences could be adjusted.

We recognize that you stopped payment on the check for the purpose of emphasizing our problems and precipitating our discussions, and this practice obviously proved successful.

Your account is now current, and our suit was not meant and should not be construed to reflect on the financial stability or integrity of your agency. You are at liberty to use this letter to allay any such implication in the minds of anyone interested, and if you wish you may refer anyone so interested to the undersigned for further confirmation.

Very truly yours,

OLYMPIC INSURANCE COMPANY

By (Signed) W. J. Smith
W.J.Smith, President

(Harrison Exhibit No. 4)

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Olympic did not, however, dismiss the lawsuit as it had agreed to do. The ensuing events are best described by referring to the testimony of Mr. H. D. Harrison, president of the Harrison Agency:

> Q Well, would you tell the jurors what transpired when the suit had not been dismissed and your payments were current and you were trying to conduct your business?
>
> A Well, first they sent this -- they gave Mr. Favret a revised contract which did not in any way conform to the contract that was reached at the hotel. Mr. Favret subsequently forwarded it to me. I read it and I returned it to Mr. Favret with the notation that I would not sign it -- I have lost my trend of thought -- then I called at Mr. Favret's suggestion, I believe I called Mr. Jack Smith and explained the situation to him that we had an agreement and that that agreement -- what they had sent me to sign was in no way or in no fashion in keeping with the agreement we had reached and had agreed to and I asked him, I said, what about it, what about the personal endorsement and what about the lawsuit?
>
> He said, well, I will call you back tomorrow. So, the next morning he called me back and agreed they would delete the personal guarantee from the contract, but would not cancel the lawsuit. And, the importance of that is that any time I went to another insurance company and tried to represent them, then the first thing that they would want to know

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is what insurance company are you doing business with now and I would say Olympic and Olympic would say we have a suit pending against Harrison and they would not plant with me. It is an impossibility to get another company into your office when you are involved in litigation with one insurance company.

Q So, the suit was not dismissed and you came to New Orleans for the trial on the injunction on September 18 of 1968, is that correct?

A This is the approximate date, yes, correct.

Q Do you recall whether or not the case was tried on September 18, 1968?

A I don't believe it was the 18th. I think it was for some reason two or three days later.

Q I believe the record shows that it was the 18th and the 20th. There was a day off, the 19th. When and under what circumstances did you learn that Olympic Insurance Company had terminated your agency?

A Well, I was notified, I believe, right here and Mr. Steeg stood up and interrupted and said his company, that is Olympic, was sending a telegram to all insurance commissioners in the various states in which we operated and to all of our subagents explaining that we no longer could do business, could represent them and I believe our subagents were also advised not to remit any premiums that they might owe us. So this, in effect,

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put us out of business right then and there on the spot.

Q And this was on September 20, 1968?

A Right. The contract still was not cancelled, but the effects were very, very devastating.

Q Mr. Harrison, I show you what purports to be a Xerox copy of a letter that Mr. Steeg handed you that day along with a copy of a telegram that was sent by Olympic by the various insurance commissioners and I ask you if you recognize these copies as the documents handed you by Olympic Insurance Company? Do you recognize that letter as the letter that Olympic handed to you on September 20, 1968 and the copy of the telegram?

A Yes, I do recognize them.

* * * * *

A At the time Olympic told you that they had sent the telegrams to the insurance commissioners, had you prepared and dispatched the check for the $58,000 which was due that day?

A Yes, I had.

Q Now, did they, in fact, send the telegram to all of the insurance commissioners? Did you learn that to be a fact?

A I learned it indirectly from the insurance commissioners.

Q Well, did they also notify all of your subagents that you were no longer

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authorized to act as general insurance agents for them?

A I can't say that they notified all of them. They notified all that they could find addresses on, yes.

Q Now, what effect did this have on your general agency business?

A It shut it down, it stopped it, it killed it.

Q Thereupon, what did you do?

A I started to commit suicide. I made a crash sale, a sale of desperation of $25,000 to Mr. Bob West and Mr. Brinkley because I had no way to turn, no place to go. My hands were locked. There was nothing I could do. (App. 276-281)

During the term of the general agency contract between Harrison and Olympic, Harrison had built its premium volume up to more than $1.25 million per year. As of the time when Olympic dispatched telegrams to the state insurance commissioners and the subagents, Harrison's premium account was current. The termination of the agency without the ninety-day notification called for in the general agency contract had the effect of immediately shutting down Harrison's operations, as Mr. Harrison testified. Harrison counterclaimed for the loss occasioned by the destruction of its business and the case was decided by a jury on written interrogatories. The interrogatories propounded to the jury and the jury's answers are as follows:

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"1. Do you find from all the evidence in this case that Olympic Insurance Company was justified in terminating its agency relationship with H. D. Harrison, Incorporated on September 20, 1968?

Answer NO

Only if your answer to the first interrogatory is "No", answer the next interrogatory:

"2. Did H. D. Harrison, Incorporated sustain damages as a result of Olympic's termination?

Answer YES

Only if your answer to the second interrogatory is "Yes", answer the next interrogatory:

"3. What is the dollar value of the damages sustained by H. D. Harrison, Incorporated?

$ 830,231.33

March 26, 1971 (Signed) Walter R. Burgess
Date Foreman"

(Document No. 84)

The trial court denied Olympic's motions for judgment n.o.v., new trial and remittitur, and entered judgment for Harrison. The Fifth Circuit Court of Appeals reversed the trial court's denial of judgment n.o.v. and remanded the case with instructions to enter judgment for Olympic. Harrison applied for and was granted a recall and stay of mandate in

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order to enable it to apply to this Honorable Court for review on writ of certiorari.

ARGUMENT

1. A MOTION FOR JUDGMENT N.O.V. SHOULD BE GRANTED OR DENIED ON THE BASIS OF THE EVIDENCE FAVORABLE TO THE PARTY AGAINST WHOM THE MOTION IS MADE, AND THE APPELLATE COURT ERRED IN FAILING TO RESTRICT ITSELF TO SUCH EVIDENCE IN RULING ON OLYMPIC'S MOTION FOR JUDGMENT N.O.V.

In the leading case of Wilkerson v. McCarthy, 336 U. S. 53 (1949), this Court said:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given. 336 U.S. at 57.

The wisdom of not considering testimony unfavorable to the party against whom a motion for judgment n.o.v. is made lies in the fact that it is a practical impossibility for a court which reviews all the testimony to avoid weighing the evidence to some extent in making a determination upon a motion for judgment n.o.v. The adoption of Rule 50(b) of the Federal Rules was never intended to circumscribe the jury's traditional prerogative of evaluating the evidence, as this Court made clear in Berry v. United States, 312 U.S. 450 (1941):

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> Rule 50(b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact -- a jury being the constitutional tribunal provided for trying facts in courts of law. 312 U.S. at 452-53.

The Tenth Circuit Court of Appeals has adopted verbatim the rule set forth in the Wilkerson case, and has held that "Testimony unfavorable to the party against whom a motion for directed verdict is made is not to be considered in passing on the motion; it is for the jury to determine the weight to be given such testimony." Lohr v. Tittle, 275 F.2d 662 (10th Cir. 1960).

The Eighth Circuit and the Fourth Circuit Courts of Appeals have formulated the rule a bit differently but have reached the same conclusion. These courts have stated that the testimony of the party against whom a motion for judgment n.o.v. is made must be taken as true for purposes of the motion. In McCracken v. Richmond, Fredericksburg & Potomac R. Co., 240 F.2d 484 (4th Cir.1957), the Fourth Circuit stated the rule this way:

> The appellee recognizes that in ruling on a motion for a directed verdict, the Court's obligation is to accept as true the interpreation of

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> the facts which is most favorable to the plaintiff and all inferences which may reasonably be drawn from such facts when viewed in the light most favorable to him. 240 F.2d at 486.

In Simpson v. Skelly Oil Company, 371 F.2d 563 (8th Cir. 1967), the Eighth Circuit contrasted the rule applicable to motions for judgment n.o.v. with the rule applicable to motions for a new trial:

> "There is a difference in the function of a judge when he is ruling on a motion for a directed verdict or a judgment n.o.v. and when he passes on a motion for a new trial. Williams v. Nichols, 266 F.2d 389, 393 (4th Cir. 1959). In the former instance, it is his duty to accept the plaintiff's version as true for the purposes of the motion, notwithstanding the existence of strong testimony to the contrary; the judge is not concerned with the weight of the evidence. On the motion for new trial, however, he has wider, though not unlimited, latitude and he may set the verdict aside where it is against the weight of the evidence, or to prevent injustice.

In sharp contrast to these authorities, the Fifth Circuit Court of Appeals showed scant deference to the jury as the "constitutional tribunal provided for trying facts in courts of law" in the instant case. The appellate court applied the following rule in passing upon Olympic's motion for judgment notwithstanding the verdict:

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> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence--not just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. 463 F.2d at 1054.

If the court considers all the evidence, and if the court determines what "reasonable" inferences can be drawn from all the evidence, how is the court to avoid weighing and evaluating the evidence? Of course, the appellate court acknowledges that "it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses" (463 F.2d at 1054), but the distinction drawn by the appellate court is based on semantics, not substance. The record clearly reveals that the appellate court made its own independent evaluation of the evidence and completely disregarded the jury's determinations.

Referring to the meeting of August 2, 1968 between the president of Harrison and the president of Olympic, but appellate court's opinion stated, presumably as an "undisputed fact, not controverted by any other evidence" (See 463 F.2d at 1054), that "The parties further agreed to draft a compromise agreement to be signed and executed at a later date." 463 F.2d at 1052. But the president of the Harrison Agency, in testimony concerning the August 2, 1968 meeting, specifically stated that "There was no mention of any discussion of anyone drawing up a separate or new, separate contract" (App. 272).

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The appellate court's finding on this point is absolutely necessary to support its conclusion that Harrison was in violation of the general agency contract when Olympic sent telegrams cancelling the agency agreement to the state insurance commissioners and to Harrison's subagents on September 20, 1968. If the modifications agreed to by the parties at the August 2, 1968 meeting were those outlined by Harrison's president in his testimony, then Harrison was in full compliance on September 20, 1968 and Olympic was not justified in cancelling the contract without ninety days' notification. The jury obviously believed Harrison's president, and the appellate court, just as obviously, did not. However, since the test for granting judgment n.o.v. in the Fifth Circuit does not require the court to restrict itself to evidence favorable to the party against whom a motion for judgment n.o.v. is made, or to accept the nonmover's version of the facts as true, the appellate court did not feel compelled to offer any rationale for discounting the testimony of Harrison's president.

The Fifth Circuit's rule on judgments n.o.v. amounts to little more than a verbal smoke screen behind which the court is free to tamper as it likes with the constitutional prerogatives of the jury, and petitioner urges this Honorable Court to take the opportunity afforded by this application to re-affirm the holding of Wilkerson v. McCarthy and restrict review of evidence on a motion for judgment n.o.v. to evidence which is favorable to the party against whom the motion is made.

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2. A MOTION FOR JUDGMENT N.O.V. SHOULD BE GRANTED ONLY WHEN THERE IS A COMPLETE ABSENCE OF PROBATIVE FACTS TO SUPPORT THE CONCLUSION REACHED BY THE JURY, AND THE APPELLATE COURT'S HOLDING TO THE CONTRARY IS IN ERROR.

In reversing the trial court's denial of Olympic's motion for judgment n.o.v., the appellate court relied on the premise that although motions for judgments n.o.v. should not be decided by which side has the better of the case, neither should such motions be granted only when there is a complete absence of probative facts to support a jury verdict.

What is the practical effect of this rule on the unquestioned tenet that it is the function of the jury, and not the court, to weigh the evidence? It clearly implies that a court is free to reject a jury's determination not only when there is no evidentiary support for it but also when the court feels it is not a reasonable conclusion. Thus the court assumes the power of exercising a convenient device for depriving a party of a jury determination: The court has only to decide that it does not think a given conclusion is reasonable, although it may be possible, in order to overturn the jury's verdict.

There could be no better illustration of how seriously this premise undercuts the powers of the jury than is afforded by a review of the instant case. The record is replete with evidence supporting the jury's view of the case. Harrison and Olympic entered into a general agency contract on May 1, 1965. There were numerous disagreements between the parties about their respective obligations under the contract and whether or not each party was living up to them. Representatives of

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Harrison and Olympic met in January of 1968 to discuss some of these differences, and certain modifications of the agency contract were agreed upon at that meeting. These modifications were set forth in a letter dated January 18, 1968 from Mr. L. R. Sellars, vice-president of Olympic, to Mr. H. D. Harrison, president of Harrison (Harrison Exhibit No.2). The dispute between the parties did not end there, however, and another meeting between Olympic and Harrison was arranged in August of 1968. At this meeting, Harrison learned for the first time that Olympic planned to get out of the mobile home insurance business. It was agreed, however, that the general agency contract would be continued through December 31, 1968 in order to enable Harrison to transfer his business to another insurance company. There was conflicting testimony as to what other agreements were arrived at during the course of the meeting, but the jury believed the version of the facts given by Harrison's president, which was that the parties had agreed to the following four points:

(1) The general agency contract would remain in effect through December 31, 1968;

(2) Harrison would keep the premium account current during the remaining term of the contract;

(3) The volume of business that Harrison could write for each month within the remaining term of the contract would be equal to the average monthly volume of business written during the first seven months of 1968; and

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(4) Olympic would dismiss the lawsuit filed against Harrison.

Since Harrison was in full compliance with the general agency contract and all of the modifications listed above on September 20, 1968, the jury concluded that Olympic was not justified in cancelling the agency contract on that date without having given the ninety-day notification of cancellation called for by the contract. The appellate court simply disagreed with the jury's interpretation of the evidence and made no pretense whatsoever of having found an error of law which warranted granting judgment n.o.v. despite the jury's findings of fact. Even without referring to the transcript, an objective reading of the appellate court's opinion leaves one with the feeling that the court has taken great liberties in interpreting testimony it never heard and in impugning the character of witnesses it never saw.

Petitioner contends Rule 50(b) does not sanction such conduct, and that the appellate court's usurpation of the jury's function of trying the facts in this case is directly attributable to the Fifth Circuit's position that judgment n.o.v. may be granted despite the existence of probative facts supporting the conclusion reached by the jury. In the leading case of Lavender v. Kurn, 327 U.S. 645 (1946), this Court enunciated a contrary rule:

> Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence

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> of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. (327 U.S. at 653, emphasis added).

Several courts of appeals have accepted the rule as representing the federal test of sufficiency of the evidence where federal jurisdiction rests on diversity of citizenship. Wratchford v. S. J. Groves & Sons Co., 405 F.2d 1061 (4th Cir. 1969); Lones v. Detroit, T. and I.R. Co., 398 F.2d 914 (6th Cir. 1968), certiorari denied, 393 U.S. 1063; Anglen v. Braniff Airways, 237 F.2d 736 (8th Cir. 1956). The Fifth Circuit Court of Appeals, however, has distinguished Lavender v. Kurn on the ground that it involved a suit under the Federal Employers' Liability Act and has held that the standard set forth therein is not a rule of general application. Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969). In discussing this conflict, noted commentators have observed that "a decision by the Supreme Court clearly stating which view it takes ... would be of helpful guidance to the lower federal courts." 2B W. BARRON AND A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 404 (1961).

The instant case exemplifies the glaring misuse to which Rule 50(b) can be put when the

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standard for applying it is anything less than the restrictive test formulated by this Court in Lavender v. Kurn, and petitioner urges the granting of this application to correct a serious misinterpretation of the law as well as a grave injustice.

3. THE APPELLATE COURT'S STATED REASONS FOR REVERSING THE TRIAL COURT'S DENIAL OF OLYMPIC'S MOTION FOR JUDGMENT N.O.V. SO FAR INVADE THE TRADITIONAL PROVINCE OF THE JURY AS TO RESULT IN A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL GUARANTEED BY THE SEVENTH AMENDMENT TO THE CONSTITUTION, WHICH PROVIDES THAT:

> IN SUITS AT COMMON LAW, WHERE THE VALUE IN CONTROVERSY SHALL EXCEED TWENTY DOLLARS, THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED, AND NO FACT TRIED BY A JURY, SHALL BE OTHERWISE REEXAMINED IN ANY COURT OF THE UNITED STATES, THAN ACCORDING TO THE RULES OF THE COMMON LAW.

Petitioner does not question the constitutionality of the procedure sanctioned by Rule 50(b) for entry of a judgment notwithstanding the verdict, but it is clear that the constitutionality of any judgment n.o.v. is dependent upon adherence to the established standards limiting the power of the courts to invade the province of the jury. When a court disregards these established standards, a violation of constitutional right may occur, and this Court has exhorted the federal judiciary to carefully guard against such transgressions:

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> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Dimick v. Schiedt, 293 U.S. 474 (1934).

A comparison of the transcript in the instant case with the opinion written by the Fifth Circuit Court of Appeals can leave little doubt that the functions of the jury were usurped by the appellate court. The Fifth Circuit paints an unrelentingly villainous portrait of Harrison's president, although the jury which actually saw and heard him believed his testimony and gave a verdict in favor of Harrison. The court states that Harrison engaged in "a course of wrongful conduct designed to preserve the agency agreement" (463 F.2d at 1051), but there is at least as much, if not more, support in the record for the jury's conclusion that while Harrison was making a sincere attempt to resolve the differences between the parties, Olympic was breaking its committments with impunity because, unknown to Harrison, Olympic had already decided to withdraw from the mobile home insurance business. The appellate court found, in direct contradiction to the finding of the jury, that "The parties further agreed to draft a compromise agreement to be signed and executed at a later date" (463 F.2d at 1052). This is a purely factual issue which the jury was entitled to determine, but the appellate court overturned the jury's finding without so much as a word of explanation. Moreover, the court went on to imply that the parties had decided this "compromise agreement" was to include a personal guaranty of the agency's obligations from Mr. H. D. Harrison, the agency's president.

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But in his testimony before the jury, Mr. Harrison categorically denied that he had made any such committment during the August 2, 1968 meeting. He stated Olympic's representatives assured him that "we have a deal" (App. 276) without insisting on a personal guaranty and without even mentioning anything about "a compromise agreement to be signed and executed at a later date."

These are only a few of the brazen forays into the province of the jury conducted by the appellate court in this case, but they are sufficient to illustrate the court's imperious disregard for the jury's right and obligation to determine issues of fact. Petitioner asserts that the appellate court's radical departure from the traditional allocation of functions between the court and the jury has resulted in the violation of petitioner's constitutional right to a jury trial.

CONCLUSION

The current confusion among the Circuits over the proper standards applicable to motions for judgment n.o.v. has resulted in the protraction of a good deal of litigation which would otherwise have been brought to a close with the rendering of the jury's verdict. The opinion of the Fifth Circuit Court of Appeals in this case gives great encouragement to those litigants whose only justification for an appeal lies in the hope of finding a more sympathetic ear at the appellate level for their version of the facts. Petitioner urges this Honorable Court to take this opportunity to settle the controversy surrounding the

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vitally important points of law raised by the instant case.

Respectfully submitted,

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Attorney for Petitioner

December 20, 1972

Of Counsel:
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Dando B. Cellini
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CERTIFICATE OF SERVICE

I, Carl J. Schumacher, Jr., attorney for petitioner herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have on this 20th day of December, 1972, served a copy of the foregoing petition for writ of certiorari upon counsel of record for all parties to this proceeding by mailing the same by United States Mail, properly addressed and first class postage prepaid.

CARL J. SCHUMACHER, JR.

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2806

OLYMPIC INSURANCE COMPANY,
Plaintiff-Appellant,

versus

H. D. HARRISON, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(July 10, 1972)

Before RIVES, BELL and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: In this diversity case Olympic Insurance Company terminated its agency agreement with H. D. Harrison, Inc., without giving ninety days notice as required by the contract. A jury found that Olympic breached the contract and awarded Harrison $830,231.33 in damages. A review of the record on appeal reveals overwhelming, undisputed evidence that Harrison repeatedly and substantially

breached the contract prior to the termination by Olympic. Consequently, we hold that the jury's finding was not supported by sufficient evidence and that Olympic was excused from performance of the contract.

On May 1, 1965, Olympic and Harrison entered into a general agency agreement which allowed Harrison to act as Olympic's general agent for the sale of mobile home insurance policies in fourteen states.[1] The contract was signed by Hugh D. Harrison, president and owner[2] of H. D. Harrison, Inc. Under the terms of the agreement Harrison was to solicit insurance business for Olympic in return for a percentage of the premiums. Although the contract initially required a shorter period of time, the parties subsequently agreed that Harrison would have three months to remit the premiums to Olympic for insurance policies sold in any given month. Thus, the premium on an insurance policy sold between December 21 and January 20, for example, would not have to be forwarded to Olympic until April 20. The contract further provided that either party could terminate the agreement, for any reason, by sending the other party ninety days notice of cancellation. As security for payment of the premiums, Mr. Harrison and his wife executed a separate document in which they personally guaranteed the payment of any premiums owed by the corporate agency to Olympic.

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[1]Alabama, Arkansas, Colorado, Florida, Illinois, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina and Tennessee.

[2]Hugh D. Harrison owned 99% of the stock in H. D. Harrison, Inc.

From its inception, the relationship was unprofitable for Olympic and unsatisfactory to Harrison. Harrison first complained to Olympic about Olympic's method of adjusting and paying losses on claims for mobile home damage. When Olympic failed to act favorably on this complaint, Mr. Harrison deliberately withheld approximately $50,000.00 in premiums which were due Olympic on December 20, 1967. In response, Olympic dispatched a representative who met with Mr. Harrison in New Orleans, Louisiana. After some discussion the parties settled their differences and Harrison paid the past-due premium monies.

In April of 1968, Olympic discovered that Harrison had been selling insurance policies having a term of seven years, and then remitting only one year's premiums to Olympic. Harrison accomplished this feat by falsifying endorsements on the copies of policies sent to Olympic. Nevertheless, Harrison discontinued this practice at the insistence of Olympic, and the contract remained in force.

On June 20, 1968, Harrison issued a check for $50,452.49 to Olympic as payment for premiums due, but when an official of Olympic attempted to cash the check, he was informed that Mr. Harrison had stopped payment. Meanwhile, Olympic had previously determined to withdraw from the mobile home insurance business. Pursuant to that decision Olympic wrote Harrison on June 26, 1968, and stated that, "it is our desire to discontinue writing business in your agency effective September 15, 1968".

Although this was the method of termination specifically provided for in the contract,[3] Harrison responded with a course of wrongful conduct designed to preserve the agency agreement. On July 13, 1968, Mr. Harrison advised Olympic that he and Mrs. Harrison were unilaterally cancelling their personal guaranty which they had given as part of the consideration for the agency contract. Mr. Harrison then informed Olympic by letter dated July 19, 1968, that he intended to immediately cancel all existing insurance policies written for Olympic by Harrison. If this threat had been carried out, Olympic would have been obligated to refund portions of the premiums on the cancelled policies. Finally, Harrison withheld the premium payment due on July 20, 1968, which meant that the total amount then owed Olympic exceeded $158,000.00.

As a result of this conduct, Olympic filed suit in federal district court in Louisiana to recover the past-due premiums and to enjoin Mr. Harrison and H. D. Harrison, Inc., from cancelling the insurance policies. Shortly thereafter, on August 2, 1968, representatives of Olympic and Harrison met in New Orleans in an attempt to compromise their differences. At the meeting Mr. Harrison stated that he had transferred all the assets out of the corporation, and that the insurance agency was just a shell. Despite this statement

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[3]The complete termination clause provided as follows:

> "This Agreement may be terminated by either party upon ninety days (90) written notice to the other party. No such termination, however, terminates any liability of either party to the other party for actions occurring prior to the termination of this Agreement, and all such payments shall continue to be due and payable in accordance with this Agreement."

the parties were able to reach at least a partial settlement. Harrison gave Olympic a check for the total amount of past-due premiums, and Olympic furnished Harrison with a letter which stated that the business relationship would continue and that "Your (Harrison's) account is now current".

The parties further agreed to draft a compromise agreement to be signed and executed at a later date. However, when the compromise agreement was presented to Mr. Harrison, he would not sign because the agreement continued the personal guaranty which he had previously renounced. Then, in an attempt to force Olympic to stop insisting on the personal guaranty, Mr. Harrison refused to make the premium payment which came due on August 20, 1968. Although Mr. Harrison finally made this payment sixteen days later, on September 5, 1968, Olympic had apparently been pushed far enough. On September 4th, Olympic amended its complaint in district court to include Harrison's default on the August 20th payment. Harrison then filed a counterclaim alleging that Olympic had systematically conspired to breach the agency agreement.

At a hearing before the district judge on September 18, 1968, Mr. Harrison took the witness stand and testified that the fixed assets of Harrison had been transferred out of the corporation and that he "doubted" that Harrison could meet the premium payments due on September 20 and October 20. The hearing was recessed and then resumed on September 20th. Mr. Harrison again took the stand and testified that a check for the premium payment due on that day would "go out in today's mail". At this point Olympic advised

Harrison in open court that the agency contract was terminated immediately, and that Olympic would no longer recognize Harrison as its agent. The hearing adjourned; and Olympic proceeded with its suit to recover the premium payments, including those payments which Harrison failed to make on September 20 and October 20.

On January 21, 1969, the district court granted Olympic's motion for summary judgment, and held that Harrison owed Olympic $302,755.63 for premiums on insurance policies sold by Harrison. The court also held that Mr. and Mrs. Harrison's personal guaranty was binding, and that they stood personally liable to Olympic for the debts of the corporation. For some reason, which we are unable to determine, the district court's order granting summary judgment was then appealed to this court on February 7, 1969 — before there had been an adjudication of Harrison's counterclaim against Olympic. While the propriety of the summary judgment was being considered at the appellate level, various motions were yet being filed in the district court in regard to the counterclaim. This court rendered a final decision on October 6, 1969, which, in effect, affirmed the granting of summary judgment by the district court. *Olympic Insurance Co.* v. *Harrison, Incorporated*, 5 Cir. 1969, 418 F. 2d 669.[4]

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[4]In this case this court reinstated its earlier dismissal of the appeal for failure to comply with Rule 12(c) of the Federal Rules of Appellate Procedure. See *Olympic Ins. Co.* v. *H. D. Harrison, Incorporated*, 5 Cir. 1969, 413 F. 2d 973. Although the appeal was technically dismissed, it is clear from the opinion in 418 F. 2d 669 that this court's decision went to the merits and had the effect of affirming the district court's order granting summary judgment for Olympic.

The counterclaim remained pending in the district court until December 5, 1969, when Harrison filed an amendment and asserted, for the first time, that Olympic had breached the contract by failing to give ninety days notice before the termination in open court on September 20, 1968. The amended Harrison counterclaim was tried before a jury which returned a verdict for Harrison in the amount of $830,231.33. The jury reached its verdict by answering three interrogatories, the first of which was as follows:[3]

> "1. Do you find from all the evidence in this case that Olympic Insurance Company was justified in terminating its agency relationship with H. D. Harrison, Incorporated on September 20, 1968?
>
> Answer ____ Yes or NO No."

After the verdict Olympic moved for judgment n.o.v. The district court denied the motion and entered judgment in favor of Harrison. This appeal followed.

At the outset we note that the essence of the jury's finding was that Olympic had a binding obligation on September 20, 1968, to notify Harrison ninety days before cancelling the contract. Olympic contends on appeal that the evidence in the record will not sustain such a finding; and we agree.

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[3]The other two interrogatories read as follows:

> "2. Did H. D. Harrison, Incorporated sustain damages as a result of Olympic's termination?
>
> Answer Yes Yes or _____ No.
>
> "3. What is the dollar value of the damages sustained by H. D. Harrison, Incorporated?
>
> $830,231.33."

The law to be applied here is, of course, that of the State of Louisiana. *Erie R. Co.* v. *Tompkins*, 1938, 304 U.S. 64. Similar to other jurisdictions,[6] Louisiana recognizes the principle that where one party substantially breaches a contract the other party to it has a defense and an excuse for non-performance. *Sullivan* v. *Carpenter*, La. App. 1966, 193 So. 2d 105; *Rosenberger* v. *Hutchinson*, La. App. 1962, 143 So. 2d 604; *C. & W. Construction Co.* v. *Travelers Indemnity Co.*, La. App. 1962, 147 So. 2d 706; See *Friedrich* v. *Grassin*, La. App. 1971, 245 So. 2d 743; *Dales Jewelers and Home Furnishers, Inc.* v. *Jones*, La. App. 1967, 204 So. 2d 126; *Marek* v. *McHardy*, Supreme Court of Louisiana, 1958, 101 So. 2d 689; *Mitchell* v. *Holder*, La. App. 1951, 51 So. 2d 828. This rule of law was clearly expressed in the district court's instruction to the jury:

> "The parties have agreed that the relationship between these parties was that of principal and agent, with Olympic being the principal and Harrison being the agent.
>
> "When an agent breaches his obligation to the principal, or threatens to breach it, the principal may terminate the agency contract. The breach must be one that can be regarded as serious to justify termination. The failure or neglect of the agent, or the threatened violation of his obligation, must be substantial and significant and relate to some important duty to the principal under the contract of agency."

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[6]See Vol. 11, Williston on Contracts, 3rd Ed., §1301 and §1305.

The record before us reveals that Harrison breached its contract on nine separate occasions between December 20, 1967, and September 18, 1968. None of the breaches was denied by Harrison. Indeed, Mr. Harrison himself admitted on cross-examination that he had engaged in the wrongful conduct as alleged by Olympic. A summary of Mr. Harrison's conduct reveals that during the ten-month period he attempted to withdraw his personal guaranty; he transferred assets out of the corporation; he falsified the length of terms on insurance policies; he threatened to cancel all existing insurance policies; and he repeatedly and intentionally withheld premium payments as they came due under the contract. It is of course true that Harrison and Olympic reached a settlement on August 2, 1968, when Harrison paid the past-due premiums and brought its account up to date. However, Harrison continued to breach the contract after the settlement. On August 20, 1968, when the next premium payment was due, Mr. Harrison again refused to turn over the monies as required by the contract. At this time Mr. Harrison still maintained to Olympic that he would not honor his personal guaranty which was later upheld as a valid agreement by this court. *Olympic Insurance Co.* v. *Harrison, Incorporated,* supra. Finally, Mr. Harrison announced in court on September 18, 1968, that he doubted the corporation would be able to make the payments for September and October.[7]

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[7]In this regard we note that Louisiana recognizes the doctrine of anticipatory breach of contract. *Marek* v. *McHardy*, Supreme Court of Louisiana, 1958, 101 So. 2d 689.

This court is well aware of the standard that must be employed in determining whether there was sufficient evidence to submit a case to the jury.

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the nonmover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and infer-

ences, and determine the credibility of witnesses."

Boeing Company v. *Shipman*, 5 Cir. (En Banc) 1969, 411 F. 2d 365, 374, 375.

In this case the numerous breaches by Harrison were undisputed facts, not controverted by any other evidence. We can only assume that the jury found that the breaches were insubstantial and of little effect on Olympic's stake in the contract. Such a finding, however, is erroneous as a matter of law. *Boeing Company* v. *Shipman*, supra.

Harrison's violations of the contract went to the very foundation of its business relationship with Olympic. In express violation of the agreement Mr. Harrison cancelled his personal guaranty and persisted in intentionally withholding premiums on insurance risks which Olympic was then obligated to bear. By these acts, which occurred both before and after the August settlement, Harrison deprived Olympic of the contractual assurance of being paid for policies sold through the Harrison agency. If Olympic had complied with the ninety-days-notice requirement on September 20, 1968, instead of terminating the agreement forthwith, Harrison would have been free to continue writing insurance policies which bound Olympic. And yet, due to Harrison's constant violations of the contract, Olympic could reasonably doubt that it would receive compensation for the risks undertaken. We hold, as a matter of law, that these uncontroverted breaches were substantial, and that Olympic was excused from further performance under the contract.

In view of this holding, it is unnecessary to consider Olympic's other assignments of error.

The judgment of the district court is reversed and the case is remanded with directions to enter judgment in favor of Olympic Insurance Company.

REVERSED AND REMANDED WITH DIRECTIONS.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N O., La.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2806

D. C. Docket No. CA 68-1401

OLYMPIC INSURANCE COMPANY,

Plaintiff-Appellant,

versus

H. D. HARRISON, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before RIVES, BELL and MORGAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter judgment in favor of Olympic Insurance Company;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

July 10, 1972

Issued As Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2806

OLYMPIC INSURANCE COMPANY,
Plaintiff-Appellant,

versus

H. D. HARRISON, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 10, 1972, 5 Cir., 1972, ____ F.2d ____).

(September 25, 1972)

Before RIVES, BELL and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.